

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 479 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

AND

Hon'ble MR.JUSTICE H.R.SHELAT

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

DEVPURI HIRAPURI

Versus

STATE OF GUJARAT

Appearance:

MRS MADHUBEN SHARMA for Petitioner
Mr. K.R. Raval, APP for Respondent No. 1.
M/s. K.J. Shethna and A.D. Shah, Amicus Curiae.

CORAM : MR.JUSTICE M.S.PARIKH and
MR.JUSTICE H.R.SHELAT

Date of decision: 27/09/1999

ORAL JUDGEMENT (Per: M.S. Parikh, J.)

Rule. Service of Rule is waived by Mr. K.P.
Raval, learned A.P.P. for the State.

The petitioner, Devpuri Hirapuri, shown to be

aged 70 years undergoing sentence (now default sentence), by virtue of his conviction under Section 20(b)(2) of the Narcotic Drugs & Psychotropic Substances Act, 1985, ('NDPS Act' for short) rendered by the learned Additional Sessions Judge, Mehsana, in Sessions Case No. 15 of 1989, confirmed by this Court in Criminal Appeal No. 622 of 1990, has moved this Special Criminal Application praying for his premature release while setting aside the order Annexure 'A' rendered by the Government of Gujarat, through its Home Department on 11th May 1999 rejecting his application for such premature release. Short ground, on which the petitioner seeks premature release, is that he has been suffering from Cancer and he has been in the terminal stage of his illness. Reference in this connection has been made to Paras (Rule) 1482 and 1485 of Bombay Jail Manual and a decision rendered by this Court on 18th August 1999 in Special Criminal Application No. 441 of 1998 (Coram: N.N. Mathur, J., as he then was). Quoting Para 1485 of the Manual, the learned Single Judge of this Court came to the conclusion that the provision is pressed into service on an extraordinary situation where it is considered to allow the prisoner to die comfortably out of prison. There is a detailed procedure provided in the Manual for such release. The premature release is opined to be neither a suspension of sentence nor remission nor commutation, by the learned Single Judge. It has therefore been concluded by the learned Single Judge that the bar provided under Section 32(A) of the NDPS Act does not come in the way of invoking the power under Para 1485 of the Manual in a fit case.

2. When the present Special Criminal Application was placed before a learned Single Judge (Coram: M.C. Patel, J.), he came to the conclusion that prima facie the provision of Section 32-A of the NDPS Act, which provides that no sentence awarded under the said Act shall be suspended, remitted or commuted, would come in the way of the petitioner. However, since the petitioner placed reliance upon the aforesaid decision of the learned Single Judge, and since the learned Judge, by his order dated 31st May 1999, was unable to agree with the said view, as, according to him, premature release from jail on any ground would prima facie amount to remission, the matter has been referred to a larger Bench. This matter is accordingly placed before this Court for deciding the difference as has been voiced in the decisions referred to hereinabove.

3. The question, in our considered opinion, that arises in this reference is whether premature release pursuant to Para 1485 of the Bombay Jail Manual would

amount to remission in the sentence imposed upon the concerned prisoner and whether such a prisoner, having been held guilty of the offence/offences punishable under the relevant provisions of the NDPS Act, is entitled to be released under the provision of said Para 1485 of the Bombay Jail Manual.

4. We have heard Ms. Madhuben Sharma, learned advocate for the petitioner and learned advocate Mr. K.J. Shethna and Mr. A.D. Shah, Amicus Curiae as well as Mr. K.P. Raval, learned APP for the State. We would first like to refer to the aforesaid Rule appearing in Para 1485 of the Bombay Jail Manual. It would read :

"When a prisoner is suffering from illness other than an acute infectious disease of such nature or severity that there is no hope of recovery and it is considered desirable to allow him the comfort of dying out of prison, the procedure detailed under the above rules shall be followed except with the Medical Officer's certificate must be in the form given at Appendix III.

All releases under this Rule count as deaths in the statistical records of the jail."

5. For the purpose of ascertaining whether the aforesaid Rule would amount to remission or not, it would be necessary to note here that the rules contained in Bombay Jail Manual have been framed pursuant to the power conferred under Section 59 of the Prisons Act, 1894. Section 59 would read as under;

"59. Power to make rules.____(1) The State Government may, by notification in the Official Gazette, make rules consistent with this Act____

- (1) xxx xxx xxx
- (2) xxx xxx xxx
- (3) xxx xxx xxx
- (4) xxx xxx xxx
- (5) xxx xxx xxx
- (6) xxx xxx xxx

- (7) defining the circumstances and regulating the conditions under which prisoners in danger of death may be released;

- (8) xxx xxx xxx
- (9) xxx xxx xxx
- (10) xxx xxx xxx
- (11) xxx xxx xxx
- (12) xxx xxx xxx
- (13) xxx xxx xxx
- (14) xxx xxx xxx
- (15) xxx xxx xxx
- (16) xxx xxx xxx
- (17) xxx xxx xxx
- (18) xxx xxx xxx
- (19) xxx xxx xxx
- (20) xxx xxx xxx
- (21) xxx xxx xxx
- (22) xxx xxx xxx
- (23) xxx xxx xxx
- (24) xxx xxx xxx
- (25) xxx xxx xxx
- (26) xxx xxx xxx
- (27) xxx xxx xxx
- (28) xxx xxx xxx

The aforesaid Rule making power has to be treated as one available under the provisions of the Prisons Act. In Government of A.P. Vs. Anne Venkateswara Rao - 1977 S.C. Page 1096, the Supreme Court had an occasion to observe that the Prisons Act does not confer any right upon the prisoner to claim remission, that the rules made under the Act should be construed within the scope and ambit of the Act and that the rules under the Prisons Act do not substitute a lesser sentence for a sentence awarded by the Court. They enable a prisoner to earn remissions but the question of remission is exclusively within the province of the appropriate Government.

6. We may now refer to a decision of this Court. While dealing with the concept of remission in contradistinction with the concept of imprisonment, a Full Bench of this Court, in Dipakkumar Bhanuprasad Upadhyay V. State of Gujarat & Ors - reported in 1998 (1) = 39 (1) G.L.R. Page 1, had an occasion to deal with the concept of imprisonment and concept of remissions in sentence of imprisonment. It has been observed, dealing with the concept of imprisonment, by this Court in Para 7 as under;

"It is thus, abundantly clear that the concept of imprisonment under the Code is a well defined and well understood concept and it only means that a

person can be said to be undergoing imprisonment when on imposition of sentence of imprisonment he is confined to the custody of the officer in the jail or other place that may be appointed by the State in this regard. We may also note that under Sec. 3(1) of the Prisons Act, 1894, word "prison" is defined so as to mean any jail or place used permanently or temporarily under the general or special orders of a State Government for the detention of prisoners and inter-alia includes, all lands and buildings appurtenant thereto."

It has been observed in Para 10 that when a sentence of imprisonment is imposed on a person, he can be said to be undergoing imprisonment only when he is in custody and confinement for that purpose. It would, therefore, be difficult for us to accept the contention of the learned Counsel that the word "imprisonment" is of such a wide amplitude so as to include even a person who though not in actual confinement or custody has been released subject to some conditions impairing his absolutely free movement. To treat a person released as undergoing actual imprisonment would be doing violence to the very concept of imprisonment.

This Court had an occasion to deal with remission order issued under Article 161 of the Constitution of India. It had also an occasion to deal with the provisions contained in Section 462 of the Code of Criminal Procedure. All those provisions were considered in the context of different kinds of remissions which might be available to a prisoner under the relevant provisions as aforesaid. It has observed that whatever be the releases of the prisoners, whether on furlough or on parole, life convicts would still have to undergo imprisonment for the remainder of their life.

7. We have also gone through the meaning of the words "remit" and "remission". The Concise Oxford Dictionary describes verb "remit" to mean 'cancel or refrain from exacting or inflicting' (a debt or punishment etc.). According to the said dictionary, the noun "remission" would inter alia mean 'the reduction of a prison sentence on account of good behaviour or the remitting of a debt or penalty etc., or forgiveness'.

The Oxford Companion to Law by David M. Wallar, 1980 Edition, at Page 1057 deals with the word "remission" as under;

"A pardon under the Great Seal. Also a part of a convict's prison sentence which is let off. Originally convicts were eligible to earn remission by good conduct and industry. It has been gradually extended and remission of one-third of the prison sentence is now given automatically (except in short sentences) subject to forfeiture of a period of this remission for bad conduct or offences against prison discipline".

In Webster's II New Riverside University Dictionary, at Page 994, the meaning of the word "remission" is, inter alia, stated as under;

1. a. An act of remitting.

b. The state or period in which something, as disease symptoms, is remitted.
2. Release, as from an obligation or debt.
3. A lessening of intensity.

From the aforesaid description and meaning of the words "remit" and "remission" appearing in the aforesaid books, it would appear that the said words take within their sweep any kind of release, from sentence of imprisonment.

8. Examining the question in the light of the observations of the Supreme Court in Anne Venkateswara Rao's case (Supra), those of Full Bench of this Court and the meanings of the word 'remission' noted above, we have no hesitation in coming to the conclusion that a premature release under aforesaid paragraph of the Bombay Jail Manual, in contradistinction from the concept of imprisonment, would amount to remission within the framework of the said Rule. The question is whether such a premature release, which in our considered opinion, would amount to remission, can be granted by the appropriate Government in a case covered under the provisions of the NDPS Act as aforesaid.

9. Section 32-A of the NDPS Act clearly bars remission being granted to a prisoner. The said provision would read as under;

"32.A. No suspension, remission or commutation in any sentence awarded under this Act Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law for the time being in force but subject to the provisions of section 33 no sentence awarded under this Act (other than section 27) shall be suspended or remitted or commuted."

It might be noted that the aforesaid provision begins with the non-obstante clause excluding the operation of any other law for the time being in force. That would mean it would exclude the provisions of the Prisons Act and the rules made thereunder. Learned Single Judge who has referred the matter has relied upon the recent decision of the Hon'ble Supreme Court in the case of Maktool Singh v. State of Punjab - AIR 1999 SC 1131, where it has been held that no kind of remission is permissible in view of the provision contained in Section 32-A of the NDPS Act. This is what the Supreme Court has observed in Para 3 of the citation;

"3. A plain reading of the above section is that it prohibits suspension of a sentence awarded under the Act except in the case of an offence under Section 27. To make the aforesaid meaning clearer the legislature has added a non-obstante limb to the Section to the effect that such prohibition is operative inspite of any other provision contained in the Code of Criminal Procedure, 1973 (for short 'the Code') or under any other law."

It is further observed in Para 10 as under;

"10. If the object of S.32A of the NDPS Act is to take away the power of the Government to suspend, remit or commute the sentence, the legislative exercise in enacting the said provision is practically of futility because even without Section 432 of the Code, the appropriate Government can suspend, remit or commute sentences in exercise of the constitutional functions."

The Supreme Court has, therefore, concluded that Section 32-A of the Act has taken away the powers of the Court to suspend a sentence passed on persons convicted under the NDPS Act (except Section 27) either during pendency of the appeal or otherwise as also the powers of the Government under Section 432, 433 and 434 of the Criminal Procedure Code, and that Section 32-A would have an overriding effect with regard to the powers of suspension, commutation and remission provided under the Criminal Procedure Code or any other law for the time being in force. It would, therefore, be not open to this Court to treat any such powers flowing from the rules made under Section 59 of the Prisons Act as being free from the embargo contained in Section 32-A of the NDPS Act.

10. We, therefore, answer the question as under;

Premature release under Para 1485 of the Bombay Jail Manual, being in contradistinction from the concept of imprisonment, would certainly amount to a remission made available under peculiar and compelling circumstances as noted in the said Para and such a remission being not available by virtue of Section 32-A of the NDPS Act, the petitioner would not be entitled to such a premature release.

11. It has been submitted on behalf of the petitioner, that the petitioner has no family and no earmarked residential place where he can be sent during the terminal stage of his illness and where he can be attended to by his near ones and dear ones; he has a couple of friends/followers and they might attend to him if he is sent at their respective places. It has been submitted that the petitioner has virtually renounced the world and he is a 'Sadhu'. If that be so, sending the petitioner during the remaining short period of his sentence which he is about to complete would amount to further penalising him. The treatment which he has been getting would stand withdrawn if he is so sent even while extending the jail custody by sending him with escort to the place where his friends/followers reside. In any view of the matter, this is not a fit case in which we should exercise our powers for enlarging the petitioner's custody in this manner. Hence, instead of sending back the matter to the learned Single Judge, we find it just and proper to dispose of this petition by rejecting the same.

12. Rule is accordingly discharged.

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